91-1219

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARIE E. CULLY,

PETITIONER,

v.

ELI COTOFAN,

RESPONDENT.

PPETITION FOR WRIT OF CERTIORARI TO THE OHIO STATE SUPREME COURT

Marie E. Cully
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(216) 651-8637

Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether tenant's right to a jury trial in an eviction action was unconstitutionally extinguished by a retroactively applied ammendment to a local court rule, requiring that an increased jury deposit have been paid at the time of the previously filed jury demand.

2. Whether tenant's right to rent deposit was unconstitutionally abrogated by the procedures followed by the Cleveland, Ohio Municipal Court.

3. Whether tenant's rights to appeal and have access to the courts were unconstitutionally denied by the courts of Ohio, dismissing the first appeal as unripe, citing a pending counterclaim, then allowing eviction

while the counterclaim was still pending, later dismissing the second appeal as "moot" since tenant had been removed from landlord's apartment.

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NO.

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MARIE E. CULLY,

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v.

ELI COTOFAN,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE OHIO STATE SUPREME COURT

The petitioner, Marie E. Cully, respectfully prays that a writ of certiorari issue to review the order entered on October 23, 1991 by the

Supreme Court of the State of Ohio dismissing petitioner's appeal and denying her motion to certify the record of the Court of Appeals of Cuyahoga County, Ohio.

OPINIONS BELOW

The Order of the Supreme Court of Ohio denying its review is unreported and is reproduced in the Appendix at App. 1. The Journal entry and opinion of the Court of Appeals for Cuyahoga County, Ohio is to the best of petitioner's knowledge unreported as is reproduced in the appendix at App.5 - App. 26. The order of the Cleveland, Ohio Municipal Court releasing liability of insurer of supersedeas bond for the first appeal from which the clerk issued a writ of restitution of premises is unreported and is reproduced in the Appendix at

BEST AVAILABLE COPY

App. 29. The order of Cleveland Municipal Court ordering restitution of is unreported and is reproduced in the Appendix at App. 38.

JURISDICTIONAL STATEMENT

On October 23, 1991, the Supreme Court of the State of Ohio entered an order denying appellate and discretinary review of that court. Jurisdiction of this Court is sought pursuant to Title 28, U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment I:

> Congress shall make no law.... abridging...the right of the people....to petition the Government for a redress of grievances.

United States Constitution,

Amendment V:

> Nor shall any person....be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XIV:

> .....nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

LOCAL COURT RULES INVOLVED

Cleveland Housing Court Rule 2.601(A):

> Rent Deposit Hearing.
>
> Fourteen (14) days after the tenant initially deposits rent into court, the Court will hold a hearing to determine whether the tenant has met the procedural prerequisites which would allow him/her to rent deposit, pursuant to O.R.C. 5321.07.
>
> On the day that the tenant deposits rent with the Clerk of Court, the date, time and courtroom where the hearing will be held will be assigned. The hearing will normally be set fourteen (14) days after the initial deposit at 1:30 p.m.
>
> When the initial deposit is made, the tenant will file an affidavit with the Clerk of Court indicating that the landlord has been served with

the required notice of repairs pursuant to O.R.C. 5321.07. An affidavit will also be required where a waiver of notice is requested or applicable.

At the hearing, the tenant will be required to verify that he/she was current in rent at tne time that he/she initially deposited rent. The tenant must also produce evidence that a written notice of conditions was served on the landlord, providing that, at the inception of the tennancy, the landlord had supplied the tenant with written notice of the name and address of the owner and owner's agent, if any. This information will be required at the hearing.

LOCAL CIVIL RULE IN EFFECT 7/12/88:

6.10
Jury demand.

A. Any party desiring a jury must demand the same in accordance with the Ohio Rules of Civil Procedure.

B. The demand for a jury must be in writing, by separate instrument, or by prominent endorsement in the caption of a pleading, and the party so demanding a jury must deposit with

the clerk at the time such demand is made the sum of ten dollars ($10.00) to apply on the expense of said jury trial. Unless such demand for a jury shall be made in accordance with the foregoing provision the case shall be tried to the court.

C. When a jury has been demanded as herein provided, and subsequently, the party demanding same desires to waive it, unless said jury is waived in writing by all parties not less than ten (10) days prior to the date set for trial, the party who requested that jury and waives it shall pay all jury fees and expenses incurred as a result of such jury demand, including the jury deposit, unless otherwise ordered by the court.

D. Jury expenses shall include a fee of ten dollars (10.00) per juror for each day or part of a day of service on a case.

Amendment to Cleveland Municipal Court Rule 6.10 effective on August 4, 1988:

CMC Rule 6.10 (B)

The demand for a jury must be in writing, by separate instrument, or by prominent endorsement in the caption of a pleading. A party demanding a jury trial must deposit with the Clerk, not less than seven full days before

before trial, the sum of $200.00 to apply toward the expense of said jury trial.

CMC Rule 6.10 (C)

Each party demanding a jury trial must file with the Clerk and provide to the Court seven full days in advance of trial, a complete set of instructions suitable for charging the jury in the captioned matter. Any party who has not filed a demand for a jury may also file jury instructions pursuant to this rule if a jury has been demanded by another party to the action.

CMC Rule 6.10 (D)

Same language employed in prior CMC Rule 6.10 (C)

CMC Rule 6.10 (E)

Same language employed in prior CMC Rule 6.10 (D)

Amendment to Cleveland Municipal Court Rule 6.10 effective February 2, 1989:

6.10(B) The demand for a jury must be in writing, by separate instrument, or by prominent endorsement in the caption of a pleading. A deposit of $200.00 must be made by the party demanding a jury at the time the jury demand is made.....

STATEMENT OF THE CASE

This is a case of refused rent deposit and subsequent eviction originating in the Housing Division of the Municipal Court of Cleveland, Ohio. Petitioner ("tenant") sought to deposit her rent in that court in an attempt to force respondent ("landlord") to cease making illegal entry to her apartment. Contrary to the Cleveland Housing Court's Rule 2.601 (A) but in keeping with the Court's practice (documented in "Ohio Landlord-Tenant Reform Revisited," 36 Cleveland State Law Review, 157. 192-193, n. 224), the clerk refused her rent deposit-without written permission from a Housing Court referee, which was denied. The landlord, having previous notice of her intent to rent deposit, filed a complaint to evict her June 21, 1988.

Tenant filed a counterclaim seeking damages and for an injunctive order allowing her rent deposit. The Landlord also moved to have rent deposited after tenant filed a jury demand and paid the $10.00 deposit required by Cleveland Municipal Court rule 6.10 as in effect on July 12, 1988 when the jury demand was filed. On August 4, 1988, Cleveland Municipal Court ammended its rule 6.10 to increase the jury deposit to $200.00 and requiring it be made 7 days in advance of trial, which could be waived on a showing of poverty; and to require the filing of jury instruction 7 days in advance of trial. Tenant attempted to file a motion to waive the additional jury deposit, but the clerk refused to file it, saying the ammendment to the rule was not retroactive. Tenant then submitted her poverty affidavit and motion

to waive to the judge's bailiff, who accepted only the poverty affidavit. After tenant's checking account balance fell below the accruing rent sought to be deposited, the Court granted landlord's motion to require rent deposit and set the case for jury trial on August 29, 1988. Tenant deposited all the required rent and August 22, 1988 moved for an extension of time until August 25, 1988 to file her proposed jury instructions. That motion was granted by an order date 8-24-88 and entered 8-26-88. On August 25, 2988, tenant filed a set of nine proposed instructions. Trial was continued on landlord's motion.

Subsequently on more than one occasion tenant received notices of hearing dates and appeared at court

only to be told there was no hearing. Finally, on receiving another hearing notice, Tenant suponeaed her landlord and his custodian, and a hearing was held January 23, 2989. Tenant had paid the $190 additional jury deposit on January 12, 1989. On February 7, 1989, Cleveland MUnicipal Court again ammended rule 6.10 to require that the $200.00 jury deposit be made at the time of filing the jury demand.

Tenant, unsure of how she could preserve her rights, on January 20,1989, moved to file an Ammended Counterclaim, instanter. She attached a copy of the proposed amended counterclaim to the motion, Paragraph 1 of the amended counterclaim states:

> This is an ammended counterclaim for damages to defendant's property, for money damages for defendant's pain and suffering, for money damages for the infringment of defendant's statutory

> right to rent deposit, for infringement under the color of state law of defendant's civil rights, and for conspiracy with a state actor to infringe on defendant's civil rights and to deter and intimidate defendant from pursuing an appeal in federal court, and for infringement of Defendant's constitutional rights of access to the courts..... (Record, Ammended Counterclaim attached to Motion to file same made 1-20-89)

The court denied tenant's motion to file her ammended Counterclaim off the record on January 23, 1989.

The hearing on January 23, 1989, proceeded without a jury. Tenant objected on the record to proceeding without a jury thus:

> Ms. Cully: Yes sir. For the record, since the Court Reporter is here, my objection to the lack of a jury trial in this case in which I have filed a counterclaim. I am being evicted for my complaints to the landlord. (Transcript filed 2/13-89, p. 2)

After the hearing, on January 24, 1989, the court entered judgment for the landlord, ordering tenant to vacate the premises by February 15, 1989. Tenant received a bailiff's notice to vacate by February 3, however. The Bailiff's office advised tenant to ignore thier notice, but tenant discovered that landlord's attorney filed an application for a writ of restitution which was issued on January 17, 1989. By Ohio Revised Code 1923.14 such a writ is valid only for ten days, therefore it would have had tc been executed prior to the date set by the court for tenant to vacate. The landlord's attorney told tenant he intended to press the writ. Then tenant sought and obtained a Temporary Restraining Order on February 1, 1989 preventing eviction prior to February 15, 1989.

Tenant also appealed the order evicting her and sought and obtained a stay of execution from the court of appeals; granted on the posting of a $5,000.00 supersedeas bond by February 14, 1989.

On April 18, 1989, the Eighth District Court of Appeals of Ohio ruled, "Case dismissed for lack of a final appealable order...The trial court has not ruled on Tenant's counterclaim."

Tenant sought release of liability of insurer of supersedeas bond in order to return the $5,000.00 she had borrowed. Cleveland Municipal Court granted release of the liability of insurer of the bond, also stating, "writ to issue forthwith." Without further orders or any decision on the pending counterclaim, the clerk issued a writ of restitution of premises on July 24, 1991. Tenant sought a writ

of prohibition from the court of appeals which was dismissed and tenant was evicted prior to service of notice that the writ of prohibition had been dismissed.

Tenant filed her second appeal from Cleveland Municipal Court which was again dismissed for want of a final appealable order. Tenant moved for reconsideration, citing CMHA v. Jackson, 423 NE 2d 177; 67 Ohio St 2d 129, which was granted. The Court of Appeals then decided that although summary judment was improper the question was "moot" since the eviction had been carried out. Tenant again sought reconsideration, which was denied. In her memorandum in support of her motion for reconsideration filed 5-17-91 she stated on the first page,

> "It would be illogical and unconstitutional to require payment of the increased jury deposit not

> required by the rule in effect when the jury demand was made.

and at page 2:

> The decision of this Court requiring a 30-day notice of needed repairs and disallowing rent deposit when a landlord refuses to accept rent after receiving a "30 day notice of needed repairs" is an unconstitutional impediment to the right to rent deposit. In effect it gives the landlord 30 days in which to refuse rent and then sucessfully evict a tenant. (Memorandum in Support of Motion for Reconsideration, 5-17-91, p.2)

Tenant appealed to the Supreme Court of Ohio, stating she was unconstitutionally denied the right to appeal and raising her previous constitutional arguments as follows:

> Proposition of Law No. 1: Since the right to a jury trial is substantial, courts may not extinguish that right by retroactively applying an ammemded local rule of court without violating the constitution.....
> Proposition of Law No. 2: The right to appeal is a constitutionally protected property right

which cannot be abridged without due process of law or by an arbitrary employment of the Civil Rules.....
Proposition of Law No. 4.: Ohio Revised Code § 5321.07 confers a constitutionally protected property right to rent deposit which cannot be abridged without due process of law.(Memorandum in Support of Supreme Court Jurisdiction 8-12-91)

REASONS FOR GRANTING THE WRIT

Ohio Revised Code 1923.10 grants a right to demand a jury trial in a eviction action. By retroactively appling the amended rule of local court, the Court of Appeals imposed an impossible condition on Tenant: that she pay the increase in jury deposit prior to the change in the rules requiring the change in the rules requiring that increased deposit. While the Cleveland Municipal Court may have wished to secure the cost of summoning a jury by increasing the jury deposit; requiring that the deposit be made on a date already past serves no

rational purpose. In addition, such a rule change would arbitrarily create a class of persons who had already made a jury demand and willing to pay the increase, but unable to do so "nunc pro tunc." This class is then denied a jury trial contrary to its fourteenth ammendment rights. (Logan v. Zimmermon Brush, 455 U.S. 422, 71 L Ed. 2d 265, 102 S. Ct. 1148)

The Eighth District Court of Appeals, lacking any brief from the appellee landlord, failed to read in the order dated 8-24-89 the granting of tenant's motion for an extension of time in which to file jury instructions and their subsequent filing 8-25-89. Their mistaken fact finding on appeal was without notice and opportunity for hearing and contrary to tenant's due

process interests in having a jury trial.

Ohio tenants are given the right to rent deposit by Ohio Revised Code 5321.07 The statute confers a non-discretionary duty on the Clerk of Courts to accept a rent deposit when tendered. (State, ex rel. Taynor v. Hysell, 19 Ohio App 3d 120; 483 NE 2d 156). Rather than let tenants proceed, the Cleveland Municipal Court requires approval of the Court's Refferree prior to accepting rent in cases varying from the standard case where repairs were not made after 30 days notice and where the landlord has not refused to accept rent(36 Cleveland State Law Review, 157 at 192.) Tenant's complaint did not conform in that she sought to stop unlawful entry damaging to her property, legal documents, and privacy. Additionally, the landlord, after being given notice of tenant's

intent to rent deposit, refused to accept the balance of that month's rent, contrary to his established practice. The procedures of the Cleveland Municipal Court ar contrary to their own rul and the law, and allow the unconstitution result in this case.

The decision of the court of appeals dismissing the first appeal as unripe and subsequent to the eviction, dismissing the second appeal as "moot" is contrary to tenant's rights guaranteed by the First, Fifth and Fourteenth Ammenmendts to the United States Constitution (Fisher v. City of Cincinnati, 753 F.Supp 681) It is also contrary to the Ohio Supreme Court decision affirming dismissal of the Writ of Prohibition and stating that tenant could still appeal after

being evicted. (State, ex rel. Cully v. Flanagan, 50 Ohio St. 3d 180; 553 NE 2d 655)

Even if the eviction were moot, this is a case "capable of repitition, yet evading review" (Southern Pacific Terminal v. ICC, 219 US 498, 55 L Ed 310, 31 S. Ct. 279) Petitioner continues to rent an apartment in the city of Cleveland, Ohio and her current apartment has inadequate heat which is not used because ther is no working thermostat, a marginally functioning toilet and believes she has no privacy or security for her legal papers. Should petitioner again attempt to rent deposit, her rent deposit could be refused and her landlord, having recieved notice of intent to rent deposit, could proceed to evict her.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ohio State supreme Court.

Respectfully submitted,

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(216) 651-8637

Petitioner Pro Se

THE SUPREME COURT OF OHIO

1991 TERM

To Wit: October 23, 1991

Case No. 91-1201

Eli Cotofan,
Appellee,

v.

Marie E. Cully,
Appellant.

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no subtantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Marie

Cully.

(Court of Appeals No 58285)

[Thomas J. Moyer]
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 58285

LOWER COURT NO. 88-CVG-18903

CLEVELAND MUNI.

MOTION NO. 16114

ELI COTOFAN,

APPELLEE

v.

MARIE E. CULLY,

APPELLANT.

DATE 05/21/91

JOURNAL ENTRY

MOTION BY APPELLANT FOR RECONSIDERATION OR IN THE ALTERNATIVE TO CERTIFY TO THE SUPREME COURT DECISION OF MAY 9, 1991, DENIED.

[James D. Sweeney]

JAMES D. SWEENEY
PRESIDING JUDGE

F.E. SWEENEY, J. CONCURS

NAHRA, J. CONCURS.

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAOGA

NO. 58285

ELI COTOFAN,

PLAINTIFF-APPELLEE

v.

MARIE E. CULLY,

DEFENDANT-APPELLANT

JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION: MAY 9,1991

JUDGMENT: AFFIRMED.

SWEENEY, JAMES D. J. :

This case involves a forcible entry and detainer action. Defendant-appelant Marie E. Cully ("Cully"), the tenant herein, appeals from the trial court's orders granting summary judgment in favor of plaintiff-appellee Eli Cotofan ("Cotofan"), the landlord herein. The order from which Cully appeals also directed: (1) Cully to vacate the

the premises pursuant to a writ of restitution;, and (2) the release of $1,670.00 in court ordered rental deposit monies to Cotofan. See Cully's Notice of Appeal filed January 27, 1989. For the reasons adduced below, we affirm.

A review of the record reveals that the rent payment was due on the first of each montha and the landlord received a partial payment of the June, 1988 rent on June 5, 1988. Cotofan gave Cully a three day notice to leave premises on June 11, 1988, and filed his complaint in forcible entry and detainer on June 21, 1988. The first cause of action sought restitution of the premises. The second couse of action sought an unspecified amount of money from Cully. Summons was issued to Cully on June 26, 2988, ordering her to appear in court on July

12, 1988 and answer the charge for eviction.

On July 12, 1988, Cully, acting pro se, filed a request for a jury trial. On July 18, 1988, Cully filed a "Motion to Dismiss Complaint; Counterclaim for Injunctive and other Relief; and Motion for a Temporary Restraining Order." The counterclaim sought money for spoiled food allegedly caused by plaintiff's conduct, and compensation for pain and suffering due to ingesting the spoiled food.

On July 25, 1988, Cotofan filed a motion for submission of rent with the court pursuant to R.C. 1923.061(B). The court granted this motion on August 10, 1988. Cully complied with this order during the pendency of the action.

On August 24, pursuant to motion, the court continued the trial date of August 29th and granted plaintiff leave

to file for summary judgment. Also in this order the court denied defendant's poverty affidavit. Plaintiff filed his motion for summary judgment on August 25, 1988, supported by a copy of the parties orginal expired lease and a copy of the three day notice to vacate premises. This motion for summary judgment was on the first cause of action only.

Cotofan filed his answer to Cully's counterclaim on August 26, 1988.

On August 31, 1988, Cully filed a motion for default judgment on her counterclaim.

Also on September 21, 1988, the journal reflects the denial of summary judgment.

On October 3, 1988, plaintiff filed: a brief in opposition to Cully's motion to waive the jury deposit (the motion to waive jury deposit is not in the record);

a brief in opposition to default judgment on the counterclaim.

On October 18, 1988, after a hearing with parties present, the court denied: (1) Cully's motion to dismiss; (2) the waiver of a jury deposit by Cully; and, (3) default judgment on the counterclaim.

On January 13, 1989, Cully filed a notice that on January 12, 1989, she deposited the additional amount of one hundred ninety dollars with the court, sufficient to satisfy the two hundred dollar jury deposit required by the court.

On January 23, 1989, the court held an oral hearing on the first cause of action in the complaint without the benefit of a jury. At the close of plaintiff's case, the court directed a verdict in favor of plaintiff.

On January 24, 1989, plaintiff filed a motion for release of the court-held

rent deposit. On this date, the court granted the release of the funds.

An entry by the court dated and jopurnalized on January 24, 1989, reflect that a hearing was held with parties present, that the motion for summary judgment was granted, and that Cully had to vacate the premises by February 15,1989.

On January 25, 1989, the court sua sponte ordered the refund of Cully's jury deposit of two hundred dollars.

Cully filed her notice of appeal on January 27, 1989, form the January 24, 1989 order of court.[1]

---

[1] This notice of appeal, assigned appellate case number 57158, was dismissed by the court for lack of a final appealable order on 4-18-89, Civ. R. 54 (B). The trial court had not ruled on defendant's counterclaim. Journal, Vol. 253, Pg. 915.

On July 18, 1989, the court released the supersedeas bond pursuant to Cully's motion and ordered the issuance of a writ of restitution.

On July 27, the writ of restitution was returned by the court's bailiff, thereby evicting Cully from the premises.

On August 2, 1989, Plaintff filed a motion to release rent funds on deposit with the court. ON that same date, Cully filed a motion to exclude the rental deposit for August 1989, from any release order. THese motions were scheduled for hering on September 26, 1989.

On August 7, 1989, plaintiff motioned the court for judgment on his second cause of action in the amount of $1,314.00.

Cully filed a notice of appeal on August 16, 1989, contesting the issuance of a writ of restitution on July 18, 1989.

Five assignments of error are raised appellant's brief. Appellee has filed no Appellate brief with the court.

I

> THE COURT ERRED IN ISSUING A WRIT OF RESTITUTION OF PREMISES WITHOUT ADJUDICATING DEFENDANT"S COUNTERCLAIM, AFTER THE EIGHTH DISTRICT COURT OF APPEALS OF OHIO RULED THAT THE COURT'S PREVIOUS ORDER DIRECTING THE DEFENDNAT TO VACATE THE PREMISES WAS NOT A FINAL APPEALABLE ORDER, DUE TO DEFENDNAT'S PENDING COUNTERCLAIM.

This court dismissed sua sponte Cully' presemt notice pf appeal on November 19, 1990, for lack of a final appealable order. Civ. R. 54(B). Upon reconsideration, the Civ. R. 54(B) dismissal was vacated by this court on December 17, 1990.

Appellant argues in this assignment that by virtue of our dismissal of her notice of appeal on November 19, 1990, pursuant to Civ. R. 54(B), the trial court was prohibited from ordering the issuance

of a writ of restitution on July 18, 1989. The appellant is mistaken.

The trial court had found for plaintiff on the first cause of action of the complaint on January 24, 1989. The notice of appeal filed by defendant from this order was dismissed by this court on April 18, 1989, for lack of a final order. See appellate case number 57158. No restraining order was in effect which would delay the eviction of Cully. The trial court, acting upon Cully's own motion, released the liability of her supersedeas bond on July 18, 1989. See App. R. &(A)(B). There was no impediment or stay in effect which would bar the court from the execution of the writ of restitution.

Assignment overruled.

II

THE COURT ERRED IN SUSTAINING OBJECTIONS TO DEFENDNAT'S CROSS-EXAMINATION OF PLAINTIFF REGARDING PLAINTIFF'S INTENT IN HOLDING DEFENDNAT TO THE COVENANTS OF THE ORGINAL LEASE AFTER ITS EXPIRATION.

In this assignment, appellant argues that the court erred in not allowing her to cross-examine Cotofan regarding the non-validity of the orginal lease terms after the expiration of the lease on November 1, 1982.

The orginal lease contained the following clause at the end of that document:

> "At the expiration of the term herein reserved, Lessee shall be a tenant from month to month. Noaccceptance of rent by the Lessor after the term herein reserved not any act or omission by the parties herein shall create a hold over lease after the term herein reserved."

Appellant contends that this clause terminated all other conditions and terms

of the lease except the term duration, to wit, a month-to-month tenancy. Plaintiff testified at the hearing that all the terms and conditions of the lease remained valid except for the duration fo the lease, which changed to a month-to-month tenancy.

On direct examination, cotofan testified as to the rental rate, the date rent was due, and the fact that Cully was late in paying her monthly rent for June, 1988.

Defendant sought to establish through cross-examination of Cotofan, that exception to the the lease terms were made after the expiration of the lease. These exceptions to the lease cnetered upon the allowance of pets in the building, and allowing tenants to insert nails in the walls so as to hang pictures. The court sustained plaintiff's objections to

questioning on these exceptions. By presenting these exceptions, Cully beleived that they tended to prove that the terms of the lease were altered to allow late payment of rent. (R. 14)

These two exceptions were not relevant in tending to prove or disprove the validity of the lease, the rate of rent, the date rent was due, or Cully's late payment of rent. See. Evid. R. 401. Accordingly, the court acted within its discretion in sustaining plaintiff's objection.

Assignment overrruled.

III

THE COURT ERRED IN DENYING DEFENDANT A JURY TRIAL, WHICH WAS DEFENDANT'S CONSTITUTIONAL RIGHT.

A defendant in a forcible entry and detainer action has a right to a trial by jury provided that any necessary bond

is posted. Re R.C. 1923.10; 1923.08; and Martin v. rogers (1987), 42 Ohio App. 3d 110, syllabus.

In the case sub judice, the defendant requested a jury trial on July 12, 1988. The required two hundred dollar jury bond was met on January 12, 1989, by the deposit of one hundred ninety dollars in additional funds with the court. Proposed jury instructions were filed by Cully on January 19, 1989.

The court heard the merits of the first cause of action on January 23, 198 , without a jury.

Local rule 6.10 of the Cleveland Municipal Court provides in pertinent part:

> 6.10 JURY DEMAND
>
> B. The demand for a jury must be in writing, by separate instrument, or by prominent endorsement in the caption of a pleading. A deposit of

> $200.00 must be made by the party demanding a jury at the time the jury demand is made. The jury demand must be filed in compliance with the time frames set forth in Civ. R. 38 (B) or Crimin R. 23(A) as appropriate.
>
> The deposit requirement shall be waived upon the presentation of evidence which establishes the indigency of the party demending the jury. Failure to compy with the provisions of this section shall constitute a waiver of jury trial.
>
> c. Each party demanding a jury trial must file with the Clerk and provide to the Court seven full days in advance of trial, a complete set of instructions suitable for charging the jury in the captioned matter. Any party who has not filed a demand for a jury may also file jury instructions pursuant to this rule if a jury has been demanded by another party to the action.
>
> ***

(Emphasis added).

Applying the local rule of court to the case before us, we find that Cully waived her right to a jury trial by: (1)

not depositing the $200. bond with the court at the time she made her demand for a jury trial; and (2) not providing the court the required proposed jury charge greater than seven days prior to trial.

Assignment overruled.

IV

THE COURT ERRED IN DENYING DEFENDNAT AN INJUNCTION DIRECTING THE CLERK TO ACCEPT DEFENDANT'S RENT DEPOSIT PURSUANT TO OHIO REVISED CODE § 5321.07.

The injunctive relief of which appellant speaks was requested in paragraph 29 of the defendant's counterclaim for injunctive relief. In that paragraph, defendant motioned the court for an order to immediately deposit her past due rent, and all future rent, with the clerk of court pursuant to R.C. 5321.07.

The court substantially complied with this request by defendnat to deposit the

rent into court when the court granted, on August 10, 1988, plaintiff's motion for submission of rent deposit. In the court's order, unpaid and future rent was ordered to be deposited with the court during the pendency of the action. Se R.C. 1923.061(B). Defendant complied fully with the order of the court by faithfully depositing the necessary sums.

Defendnat's use of R.C. 5321.07 in her prayer for injunctive relief is in error. That section, allowing a tenant to deposit rent with a court, is to be used where the tenant is current with his or her rent payment and the landlord has failed to correct defective conditions in the premises after having received at minimum a thirty day written notification of needed repairs to the leased premises. Cully was not current in her June, 1988,

rent payment at the time of the complaint and had not given Cotofan the required notification of defects in the premises.

Assignment overruled.

V

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR PLAINTFF WHEN PLAINTIFF HAD WAIVED HIS RIGHT TO SERVE NOTICE TO VACATE IN JUNE 1988 BY ACCEPT-INT A PARTIAL PAYMENT OF FUTURE RENT IN JUNE 1988.

Under the terms of the lease, Cully's rental payment was due on the first day of each month. On june 5, 1988, she issued a check for one hundred dollars to Cotofan as partial payment for the rent owning for that month. This partial payment for the rent was accepted by Cotofan. On June 11, 1988, Cotofan issued to Cully a three-day notice to leave premises pursuant to R.C. 1923.04.

On June 13, 1988, Cotofan refused to accept the balanceof the rent due for June by returning a check issued by Cully for that amount.

Appellant's assertion that a notice to vacate may be waived by a landlord's acceptance of future rent is correct. See Associated Estates Corp. v. Bartell (1985), 24 Ohio App 3d 6, and Marchioni v. Wilson (1984) 20 Ohio Misc. 2d 10. However, the partial payemnt accepted by Cotofam was not for rent owed for the future. The June 5, 1988 payment represented past due rent for an obligati due on June 1, 1988. "...., [A] landlord acceptance of past due rent does not waive the statutory three-day notice to vacate the premises." Graham v. Pavarini (Cuyahoga, 1983), 9 Ohio App. 3d 89, paragraph number one of the syllabus.

With the foregoing in mind, we find that the court incorrectly granted summary judgment in favor of plaintiff, because plaintiff may have waived the ability to declare Cully in default of her rent for the month of June, and in turn, nullify issuing a notice to vacate. The record contains evidence of cancelled rent checks by Cully to Cotofan which indicate a pattern of acceptance of late and partial rent payments by Cotofan. These checks, attached to Cully's counter-claim as exhibits 1-5, show the following dates and amounts of payments:

April 4, 1988	$100.00
April 18, 1988	95.00
May 6, 1988	100.00
May 16, 1988	95.00
June 5, 1988	100.00

There is no indication that Cully was ever told that strict compliance with the first of each month payment date, as

called for by the lease, would be demanded in the future. This established a course of conduct whereby strict compliance was not required which, in turn, operates as a waiver of Cotofan's right to declare the partial and late payments in June of a988 effected a forfeiture of Cully's right to remain at the premises for that month. Lauch v. Monning (1968), 15 Ohio App. 2d 112, 113; MIko v. Briola (August 31, 1989) Cuyahoga App. No. 56687, unreported. Here there were unresolved issues of genuine material fact which preclude entitling Cotofan to judgment as a matter of law on the issue of restitution Civ. R. 56.

Despite the fact the motion for summary judgment was incorrectly determined, the motion itself is moot since Cully has not been in possession

of the premises since July 27, 2989. To remand the matter for a hearing on the non- existent issue of restitution would be an abstraction and of no practical effect. Assignment overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal

It is ordered that a special mandate issue out of this court directing the Cleveland Mnicipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exception.

NAHRA, P.J. and

FRANCIS E. SWEENEY, J. CONCUR.

[James D. Sweeney]
JAMES D. SWEENEY
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22 (D), Ohio Rules of Appellate Procedure. This is an anouncement of decision (see Rule 26). Ten (10) days from the date hereof ths document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO, EIGHT DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 58285

LOWER COURT NO. 88-CVG-18903
CLEVELAND MUNI.

MOTION 10490

DATE 12/17/90

JOURNAL ENTRY

MOTION BY APPELLANT FOR RECONSIDERATION OR IN THE ALTERNATIVE, TO CERTIFY DECISION TO OHIO SUPREME COURT IS GRANTED IN PART. MOTION FOR RECONSIDERATION IS GRANTED. THAT PORTION OF ENTRY 09693 DATED 11/19/90 WHICH DISMISSED THE APPEAL PER CIV. R. 54(B) IS VACATED. APPELLEE'S BRIEF DUE 1/4/90. APPELLEE's MOTION FOR INTERIM ORDER, IN ENTRY NO. 09693 IS DENIED.

KRUPANSKY, J. CONCURS.

[John V. Corrigan]
PRESIDING JUDGE
JOHN V. CORRIGAN

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 58285

LOWER COURT NO 88 CVG-18903
CLEVELAND MUNI.

MOTION NO. 09693

ELI COTOFAN,

APPELLEE

v.

MARIE E. CULLY,

APPELLANT.

DATE 11/19/90

JOURNAL ENTRY

MOTION BY APPELLEE FOR INTERIM ORDER IS DENIED AS MOOT. SUA SPONTE, THE CASE IS DISMISSED PER CIV. R. 54 (B).

KRUPANSKY, J. CONCURS

[David T. Matia]
PRESIDING JUDGE
DAVID T. MATIA

Cleveland Municipal Court

GAINES JUL 18 1989

No. 88 CVG 18903

ELI COTOFAN

Plaintiff

vs.

MARIE E. CULLY

Defendant.

JUDGMENT ENTRY

Defendant's motion releasing liability of insurer upon supersedeas bond is granted. Writ to issue forthwith.

[Clarence L. Gaines]

Judge

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 57158

LOWER COURT NO. 88-CVG-18903

CLEVELAND MUNI

MOTION NO. 90243

ELI COTOFAN,

APELLEE,

-VS-

MARIE E. CULLY,

APPELLANT

DATE 04/18/89

JOURNAL ENTRY

MOTION BY APPELLEE TO DISMISS APPEAL IS DENIED AS MOOT. CASE DISMISSED FOR LACK OF A FINAL APPEALABLE ORDER. SEE CIV.R. 54(B). THE TRIAL COURT HAS NOT RULED ON APPELLANT'S COUNTERCLAIM.

ANN MCMANAMON, C.J. CONCURS

[Francis E. Sweeney]

PRESIDING JUDGE
FRANCIS E. SWEENEY

PURSUANT TO RULE 22 (D) AND RULE 26, OHIO RULES OF APPELLANT PROCEEDURE, THIS DECISION WIL BE JOURNALIZED AND WILL BECOME THE JUDGEMENT AND ORDER OF THE COURT AND THE TIME PERIOD FOR REVIEW WILL BEGIN TO RUN, UNLESS A MOTION FOR RECONSIDERATION WITH SUPPORTING BRIEF IS FILED WITHIN TEN (10) DAYS FROM THIS ANNOUNCEMENT OF THE COURT'S DECISION.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 57158

LOWER COURT NO. 88-CVG-18903
CLEVELAND MUNI

MOTION NO. 88056

ELI COTOFAN,

APPELLEE,

-VS-

MARIE E. CULLY

APPELLANT.

DATE 02/08/89

JOURNAL ENTRY

MOTION BY APPELLANT FOR STAY OF EXECUTION PENDING APPEAL GRANTED ON CONDITION OF FILING A SURETY BOND IN THE AMOUNT OF $5,000.00 BY FEBRUARY 14, 1989.

KRUPANSKY, J. CONCURS.

[John V. Corrigan]
PRESIDING JUDGE
JOHN V. CORRIGAN

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

CASE NO. 88 CVG 18903

JUDGE CL:ARENCE L. GAINES

ELI COTOFAN,

Plaintiff,

v.

MARIE E. CULLY,

Defendant.

TEMPORARY RESTRAINING ORDER

This cause came on for hearing on Defendant's Motion for a Temporary Restraining Order and Affidavit this 1 st day of February 1989, and it appearing to the Court that plaintiff is committing and is about to commit acts as set for in defendant's Affidavit attached to her Motion for a Temporary Restraining Order, and will continue to do so unless restrained by order of this court, and that immediate or irreparable injury, loss or damage will

result to defendant before notice can be given and plaintiff, and/or his attorney can be heard in opposition, it is,

ORDERED, that plaintiff, his agents, servants, employees and all persons in active concert or participation with them be and they hereby are, restrained from in any manner, either directly or indirectly, taking any action to execute the judgment granting plaintiff the right to resistitution of the premises known as 1384 West 83rd Street Apartment 7, Cleveland, Ohio 44102, prior to February 15, 1989, the date set by that judgment for defendant to vacate the premises or from removing any of defendnat's property, effects, or papers from said premises prior to February 15, 1989, and it is further

ORDERED, that this order expire within

15 days after entry unless within such time the order is, for good couse shown, extended, or unless the plaintiff consents to its extension to a larger period; and it is further

ORDERED, that copies of this order and of this order and of the Motion and the affidavit submitted therewith, be immediately served by the clerk of this court by certified mail upon the plaintiff.

The Court finds that no bond is necessary to protect the plaintiff.

Issued at 3:42 pm o'clock, February 1, 1989.

[Clarence L. Gaines]
JUDGE

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

CASE NO. 88 CVG 18903

JUDGE CLARENCE L. GAINES

ELI COTOFAN,

Plaintiff,

vs.

MARIE E. CULLY,

Defendant.

ORDER

By order of the Court, in accordance with trial results in the above-captioned matter, the Clerk of Courts is directed to release to Mr. Eli Cotofan, the One Thousand Six Hundred and Seventy Dollars and 00/100 ($1,670.00) previously deposited with the Clerk as rent deposit.

1-24-89
DATE

[Clarence L. Gaines]
HONORABLE CLARENCE L. GAINES

CLEVELAND MUNICIPAL COURT

GAINES JAN 24 1989

88 CVG 18903

ELI COTOFAN,

Plantiff,

vs.

MARIE E. CULLY,

Defendnat.

JUDGMENT ENTRY

Hearing held; all parties in Court.

Motion for Summary JUdgment granted.

Defendant to vacate the premises by

February 15, 1989.

[Clarence L Gaines]
Judge

CLEVELAND MUNICIPAL COURT

AUGUST 24, 1988

No. 88 CVG18903

ELI COTOFAN

Plaintiff,

vs.

MARIE E. CULLY

Defendant.

JUDGEMENT ENTRY

Defendant's poverty affidavit is denied.

Defendant's motion for extension of time to file proposed jury instructions is granted.

Plaintiff motion for leave to file motion for summary judgment granted

Plaintiff's motion for con't of trial date granted.

Defendaant's motions in liminie set for oral hearing.

JUDGMENT ENTRY RECEIVED
FOR JOURNALIZATION

AUG 26 1988

[Lillian W. Burke]
JUdge

CLEVELAND MUNICIPAL COURT

BURKE AUG 10 1988

NO. 88 CVG 18903

Eli Cotofan

Plaintiff

vs

Marie Cully

Defendant

JUDGMENT ENTRY

Plaintiff's motion to escrow rent is granted. Defendant is ordered to deposit $545.00 with the Clerk of Court on or before 8-15-88, covering rent through 8-31-88 and $225.00 the 1st of each month thereafter, until the case is resolved. Set for jury trial on August 29, 2988 at 9:30 am

[Lillian W. Burke[
JUdge